UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2708

September Term, 2015

JAMES GRANVILLE LAWSON

v.

STATE OF MARYLAND

Kehoe,
Graeff,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: October 20, 2016

A jury in the Circuit Court for Anne Arundel County convicted James Lawson, appellant, of one count of illegal possession of a regulated firearm. He was sentenced, thereafter, to a term of five years' imprisonment without the possibility of parole. In this appeal, appellant presents the following questions for our review:

1. Did the trial court err in allowing three police officers to testify that they responded to a call that a handgun had been found at the motel where Appellant was staying?

2. Did the trial court err in refusing to give a limiting instruction related to the testimony of the three police officers?

3. Did the trial court err in permitting a firearms examiner to testify as a lay witness regarding the handgun allegedly possessed by Appellant?

4. Did the trial court impose an illegal sentence?

For reasons to follow, we answer all questions in the negative and affirm the judgment of the circuit court.

BACKGROUND

On June 27, 2015, Anne Arundel County Police Officer Dominique Parker responded to a local motel after an employee, Iris Cartagena, reported finding a "weapon" wrapped in a black bandana in one of the guest rooms. Upon being directed to the appropriate room, Officer Parker came in contact with appellant, who was standing in the doorframe of the room, speaking with several officers, including Gregory Wright and Stanley Newborn. During that conversation, appellant consented to a search of the room which ultimately yielded no results.

However, throughout the search, Officer Parker observed appellant "shaking profusely" and acting "very nervous." Parker also noticed that appellant kept looking at a

trash can, located outside of the motel room but close to where he was standing. Officer Wright looked inside of the trash can, removed its lining, and discovered a gun wrapped in a black bandana at the bottom of the trash can. Appellant, who was talking on his cell phone at the time, stated, "They found the gun." Cartagena later identified the gun as being "consistent" with the weapon she discovered in appellant's room. He was subsequently arrested and charged with violating several criminal statutes, including Section 5-133(c) of the Maryland Public Safety Code (Count 1), which proscribes the possession of a firearm by a person previously convicted of a crime of violence, and Section 5-133(b) of the Maryland Public Safety Code (Count 2), which proscribes the possession of a firearm by a person previously convicted of a disqualifying crime.

At trial, the State questioned Officer Parker as to why he initially responded to the motel. Over defense counsel's general objection, Parker stated that he went to the motel because someone had reported finding "a handgun." Shortly thereafter, the State asked the officer what he did when he first arrived at the motel, and Parker responded that he "made contact with the person inside of the room where they say that they found the gun at." Defense counsel did not lodge an objection at this time.

Later, the State asked Officers Wright and Newborn similar questions. Officer Wright testified that he went to the motel because "a cleaning lady at the [motel] had found a gun." Officer Newborn testified that he was responding to "a gun being found in a hotel [sic] room." During each of these exchanges, defense counsel lodged a general objection, which the trial court overruled.

Through an interpreter, Cartagena testified regarding the circumstances under which the gun was discovered. She stated that she was cleaning appellant's room when she discovered a "weapon" wrapped in a black handkerchief underneath a pillow. Cartagena told one of the motel's managers that she "was not going to clean the room, because there was a weapon in that room." She later reiterated that she informed her manager that she had found "a gun." No objections were lodged by defense counsel during any of the above testimony.

On the second day of trial, the State called Anne Arundel County Corporal David Zinn as a witness. Just prior, defense counsel requested a bench conference, at which time the following colloquy ensued:

> [DEFENSE]: The witness of the record, I would note my objection to having Corporal Zinn testify in this case. We believe that he is an expert and that proper notice needs to be given in order for him to testify. And so we would be objecting under the Rules of Evidence, as well as any constitutional and due process rights, and anything associated with that.
>
> THE COURT: Okay. The objection is noted for the record. I know we had this discussion back in chambers, the State has indicated they're not calling him as an expert, but just to provide lay opinion testimony versus fact testimony.

The trial court overruled the objection, and the State continued with its case. Corporal Zinn testified that he worked in the Firearms Investigation Section and that he was responsible for "all the firearms that the police department comes in contact with." He further stated that he test-fired the gun retrieved from the trash can at the motel and that,

based on his analysis of the weapon, the gun was operable. He also authored a report, which the trial court admitted over objection, indicating the same.

At the close of all evidence, the trial court discussed proposed jury instructions with the State and defense counsel. One proposed instruction, requested by defense counsel, was a cautionary instruction regarding the jury's use of reports to the police:

> You have heard evidence in this case regarding certain reports made to police during the course of this criminal investigation. Such reports cannot be used by you as evidence of their truth. Rather those reports were offered simply to explain the actions of the police. Police receive all kinds of communications during the course of an investigation, some of which turns out later to be false or inaccurate. As a result you must base your decision in this case upon the evidence, not upon reports made to the police.

(Emphasis in original).

The trial court denied defense counsel's request, and the case was ultimately submitted to the jury for deliberation. Prior to this, defense counsel stipulated (and the jury was ultimately informed) that appellant "was previously convicted of a disqualifying crime in this State that prohibited him from possessing a regulated firearm at the time of the offense." Nevertheless, the State made clear that the "disqualifying crime" was a crime of violence:

> [STATE]: May I have this marked? This is the true test.
>
> THE COURT: Yes.
>
> [STATE]: We'll just…reference it….it's a true test of the prior conviction that we were referring to was for attempted robbery – the other one doesn't matter – to the attempted robbery is the one that – oh, sorry, there's another –
>
> THE COURT: Is that the New York conviction?

[STATE]: There's a secondary burglary, but I think that's the one that may have been the youthful offender. So, the attempted robbery would be the crime of violence –

THE COURT: Okay.

[STATE]: - but as Your Honor knows, when you give instructions, all we'll say is a disqualifying offense.

THE COURT: Right, exactly.

[STATE]: So…for the record, that took place, the conviction was in [2009]….And then he served a sentence, and was still on parole; just for the record….So obviously none of that we will talk about either. But I will keep that in sight.

The parties also discussed how the stipulation would affect the court's instructions to the jury:

[STATE]: So, the Court is aware, too, and we've noted it on the record…obviously, when the jury – when the verdict sheet goes back, it's only going to have one count on it.

THE COURT: Um-hum.

[STATE]: I mean, I don't – I suppose I could probably – I think [Count 2], it just merges into [Count 1].

THE COURT: Um-hum.

[STATE]: So I don't – so, I could nolle pros if it's an issue. But to me, it's just the same as if we'll merge it at the end.

THE COURT: Okay.

[STATE]: So, it will only go as one count, though, obviously, because we can't distinguish between Counts 1 and 2. Because Count 1 is after a crime of violence, Count 2 is after a disqualifying crime.

THE COURT: Okay. All right. I've no problem with that.

[DEFENSE]: Okay.

Consequently, the court instructed the jury on only one count, specifically that a person "may not possess a regulated firearm if the person has been previously convicted of a disqualifying offense." Appellant was ultimately convicted of this sole count. The court sentenced him to a term of five years' imprisonment without the possibility of parole.

DISCUSSION

I.

Appellant first argues that the trial court erred in allowing Officers Parker, Wright, and Newborn to testify that they responded to a call that a handgun had been found at the motel where he was staying. Appellant avers that such testimony was inadmissible hearsay.

We hold this issue to be waived. Although defense counsel lodged an appropriate objection when the State initially questioned each officer, defense counsel did not object or make a motion to strike when Officer Parker testified that he reported to the motel room "where they say that they found the gun at." In addition, defense counsel did not object or make a motion to strike when Cartagena testified that she told her manager that "there was a weapon in that room" or when she testified that she informed her manager that she had found "a gun." Accordingly, this issue was not preserved for our review. *See e.g.* Md. Rule 4-323(a); *Schmitt v. State*, 140 Md. App. 1, 22 (2001) ("[H]earsay unobjected to is just as admissible as any other evidence."); *Fowlkes v. State,* 117 Md. App. 573, 588 (1997) ("For appellant's objections to be timely made and thus preserved for our review, defense

counsel would have had to object each time a question concerning the objectionable issue was posed or to request a continuing objection to the entire line of questioning.") (internal citations and quotations omitted).

Assuming, *arguendo,* that appellant's argument was preserved, we conclude that the trial court did not err in admitting the evidence. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Maryland Rule 5-801(c). Such out-of-court statements are inadmissible unless they are permitted by applicable constitutional provisions or statutes, or unless they fall under one of the hearsay exceptions recognized by the Maryland Rules. Md. Rule 5-802. On the other hand, if the statement "is not offered for the truth of the matter asserted, it is not hearsay and it will not be excluded under the hearsay rule." *Stoddard v. State,* 389 Md. 681, 689 (2005). Whether a statement is offered for its truth "depends on the purpose for which the statement is offered at trial." *Hardison v. State,* 118 Md. App. 225, 234 (1997).

Here, it is evident that the officers' testimony was not being offered for the truth of the matter asserted; that is, it was not being offered to show that someone had, in fact, found a gun in one of the motel rooms. Rather, the evidence was offered for the purpose of establishing why the officers responded to the motel. Because the testimony was not hearsay, the trial court did not err in admitting it for this purpose. *See Graves v. State,* 334 Md. 30, 38 (1994) ("It is well established that a relevant extrajudicial statement is admissible as nonhearsay when it is offered for the purpose of showing that a person relied

on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true.").

Although appellant acknowledged that statements made to a police officer may be admitted for a non-hearsay purpose, he insists that the statements in his case were not admissible because they "left the jury with a virtually inescapable inference that the handgun recovered from the trash can was the same item" discovered by Cartagena in his motel room.

In putting forth this argument, he relies almost exclusively on this Court's opinion in *Parker v. State,* 408 Md. 428 (2009). In that case, a police officer received a tip from a confidential informant that "a black male wearing a blue baseball cap and black hooded sweatshirt" was selling drugs at a particular location. *Id.* at 431. The officer went to the location and spotted "a black male wearing a blue baseball cap and a black hooded sweatshirt – later identified as [Kelvin Parker.]" *Id.* Parker was eventually stopped and searched, whereupon several gel caps of heroin were recovered from his person. *Id.* at 432. Parker was ultimately convicted of possession of heroin. *Id* at 434.

On appeal, Parker argued that the trial court erred in allowing the officer to testify regarding the information relayed by the confidential informant, as this was inadmissible hearsay. *Id.* The State countered that the testimony was not hearsay, and thus was admissible, because it was not offered for its truth but rather to explain why the officer was there and the actions he took. *Id.* at 435. The Court of Appeals ultimately agreed with Parker and held that "the trial court committed reversible error in admitting the confidential informant's extrajudicial statement[.]" *Id.*

In explaining its holding, the Court noted that, while an extrajudicial statement offered to show that a police officer acted on the statement is generally admissible, such a statement may be excluded if the officer "becomes more specific by repeating definite complaints of a particular crime by the accused[.]" *Id.* at 440 (internal citations omitted). In these instances, the extrajudicial statement should be excluded as hearsay because it "is so likely to be misused by the jury as evidence of the fact asserted[.]" *Id.* The Court further reasoned that "when the hearsay provides contemporaneous and specific information about the defendant's clothing, location, and activity, it can be highly persuasive as to the defendant's actual guilt of the crime charged[.]" *Id.* at 443. The Court concluded that, in Parker's case, the extrajudicial statement "contained too much specific information about [Parker] and his criminal activity to be justified by the proffered non-hearsay purpose of establishing why the [officer] was at the intersection." *Id.* at 431.

Despite their superficial similarities, *Parker* and the instant case are clearly distinguishable. The only information contained in the statements referenced by Officers Parker, Wright, and Newborn was that someone found a handgun in one of the motel's rooms. There was nothing in the statements pertaining to criminal activity, let alone appellant's involvement in a crime. The statements contained no information identifying either appellant or the room in which the gun was found, nor were there any other details linking him to the handgun. Moreover, any inference that the recovered handgun was the same one discovered by Cartagena was well-established by her unchallenged testimony, wherein she identified the recovered handgun as being consistent with the one she discovered in appellant's room. In short, virtually none of the dangers discussed in *Parker*

are evident in the instant case; thus, we conclude that the statements were properly admitted as non-hearsay.

II.

Appellant next contends that, if the trial court was correct in permitting the officers to testify regarding the above-referenced extrajudicial statement, then it erred in refusing to give a limiting instruction "that would have prohibited the jury from considering this testimony for the truth of the matter asserted." Appellant avers that the trial court was required to give such an instruction under Maryland Rule 4-325(c), as the instruction was a correct statement of law, applicable under the facts of the case, and not fairly covered in the instructions actually given. He further argues that, under Maryland Rule 5-105, the trial court must, upon request, give a limiting instruction when evidence is admissible for one purpose but inadmissible for another purpose.

"We review the trial court's decision refusing to offer a requested jury instruction under an abuse of discretion standard." *Vielot v. State,* 225 Md. App. 492, 505 (2015). Generally, a trial court's failure to give a requested instruction is erroneous when: "(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Id.* (internal citations omitted). Despite this mandate, the propriety of a given instruction must be assessed in light of the jury instructions as a whole and whether the instructions, taken together, adequately protected the defendant's rights. In other words, jury instructions "must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence,

the defendant has not been prejudiced and reversal is inappropriate." *Fleming v. State,* 373 Md. 426, 433 (2003).

We hold that the trial court did not err in refusing to give the instruction requested by defense counsel. Although the instruction did correctly state the legal principle regarding extrajudicial statements being used for their truth, the instruction, as a whole, was not appropriate. First, the intimation that reports to police are sometimes "false or inaccurate" was an inference of fact, which are generally improper in jury instructions. *See Patterson v. State,* 356 Md. 677, 684 (1999) ("Instructions as to facts and inferences of facts are normally not required."). Moreover, the statement that the jury must base its decision "upon the evidence, not upon reports made to police" was not a correct statement of law. The reports made to the police *were* evidence – they were evidence of why the officers reported to the motel in the first place.

Finally, the jury instructions as a whole adequately covered the law of the case and protected appellant's rights. The jury was instructed that a defendant is presumed innocent and that the State must prove all elements beyond a reasonable doubt. The jury was also instructed that a defendant's presence at the time and place of a crime, without more, is insufficient to prove that the defendant committed the crime. The jury was instructed on the elements of possession and the circumstances under which a defendant may be in possession of a firearm. At no time did the court indicate that a witness's report to police was sufficient, or even relevant, in determining whether a defendant had possession of a firearm. As such, we conclude that the jury instructions, taken as a whole, properly

protected appellant's rights, despite the lack of a specific instruction regarding the reports made by Cartagena to police.

We likewise reject appellant's claim that the instruction was required under Maryland Rule 5-105. Under that rule, when evidence is admissible for one purpose but not admissible for another purpose, "the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." *Id.* Appellant maintains that the rule required a limiting instruction because the statements to police, were admissible as explaining the actions of police, however they were inadmissible as evidence of the truth of the matter asserted.

Unfortunately, there is a dearth of Maryland case law interpreting this rule, and we have found no Maryland case in which this Court or the Court of Appeals held that a trial court erred in failing to give a limiting instruction pursuant to this rule. In fact, what little case law exists seems to support the position that a limiting instruction was not required in this case.

In *Grier v. State,* 351 Md. 241 (1998), the Court of Appeals provided a terse explanation of the rule:

> Rule 5-105 addresses the situation in which evidence is admissible only for a limited purpose….For example, Rule 5-105 is implicated when "other crimes" evidence is admitted for the limited purpose of proving defendant's intent or motive, and not for the purpose of proving propensity for criminal conduct. *See* [Md. Rule] 5-404. In that circumstance, a court, upon defendant's request, should instruct the jury that the evidence should be used only for the limited purpose of proving intent or motive.

Id. at 251.

In *Bernadyn v. State*, 390 Md. 1 (2005), this Court briefly discussed this rule in the context of hearsay:

> If the proponent of a statement claims to offer the evidence for a purpose other than its truth, but also offers the statement to prove the truth of a matter asserted therein, the court should either exclude the evidence or make clear that the evidence is admitted for a limited purpose. Defense counsel is then on notice that the evidence is admissible, *albeit* for a limited purpose, and may then request a limiting instruction [under Md. Rule 5-105].

Id. at 15 (emphasis in original).

A similar theme can be found at the federal level, wherein Rule 105 of the Federal Rules of Evidence, from which the Maryland rule was derived without substantive changes, has been construed in light of the evidence's prejudicial impact:

> The sense of the limited admissibility rule embodied in Rule 105 is that evidence which is properly admissible for one purpose should not be automatically excluded merely because it is inadmissible for another – the trial court is to weigh the probative value of the evidence against the risks inherent in its admission to determine whether the evidence should be excluded or admitted for its limited use. Once the court determines that such evidence should be admitted, however, it cannot refuse a requested limiting instruction.

Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 265-66 (5th Cir. 1980) (internal citations omitted);

From these explanations, it appears that the purpose of the rule is to provide an additional safeguard in situations in which evidence is properly admitted for a limited purpose but carries with it a legitimate danger that the jury will use the evidence in a manner that would normally render the evidence inadmissible. Thus, as explained by the Court of Appeals in *Grier,* when evidence of "other crimes" committed by a defendant, generally inadmissible due to its prejudicial nature, is admitted for the legitimate purpose

of showing intent or motive, a defendant can request, and the court must give, a limiting instruction cautioning the jury that it may consider the evidence only for its limited purpose. Or, as was the case in *Bernadyn,* when the State introduces an extrajudicial statement for a non-hearsay purpose *and* for the purpose of establishing the truth of the matter asserted, the court can either exclude the evidence or instruct the jury that it should consider the statement only for its non-hearsay purpose.

In short, appellant's interpretation of the rule – that a requested limiting instruction must be given when admitted evidence can be inadmissible *in any circumstances* –is not consistent with the overall purpose of the rule. *See Holmes v. State,* 350 Md. 412, 422 (1998) (When construing an ambiguous rule, the goal of an appellate court is "to give the rule a reasonable interpretation in tune with logic and common sense.") (internal citations omitted). Under appellant's interpretation, just about every piece of evidence could potentially be subject to the mandates of Rule 5-105, as even relevant and non-prejudicial evidence offered in a given situation can become, in theory, irrelevant and prejudicial, and thus inadmissible, if offered under different circumstances.

As such, we hold that the trial court did not err in refusing to give the requested instruction. The statements offered into evidence were not inherently inadmissible, as was the statement in *Bernadyn,* because the statements were not offered as substantive evidence of the truth of the matter asserted. Unlike the "other crimes" evidence discussed in *Grier*, the statements in the present case were not overly prejudicial, nor were they likely to lead to any inferences regarding appellant's guilt, as previously discussed. In short, the need to limit unfair prejudice, which appears to be the primary purpose of the rule, was not

applicable in the instant case. *See e.g. State v. Watson,* 321 Md. 47, 59 (1990) ("The limiting instruction, that the prior conviction evidence should be used solely for the purpose of evaluating the character witnesses' knowledge of the defendant, is intended to mitigate the prejudice to the defendant of exposing the jury to evidence of prior crimes where they are appropriately admitted."); *Boston Scientific Corp. v. Mirowski Family Ventures, LLC,* 227 Md. App. 177, 204 (2016) (limiting instruction pursuant to Md. Rule 5-105 "curbed any prejudice the evidence may have had[.]"); *Weiner v. State,* 55 Md. App. 548, 554 (1983) ("The trial judge is required to offset or avoid…the inherent human tendency to substitute a predisposition of guilt for the constitutional presumption of innocence when an accused's reputation as a 'bad man' becomes known."); *See also e.g. U.S. v. Umawa Oke Imo,* 739 F.3d 226, 234 (5th Cir. 2014) (Failure to give limiting instruction under F.R.E. 105 not erroneous where the defendant "fail[ed] to point to any instance during the trial when the prosecution or the court utilized [the evidence] in an impermissible manner."); *U.S. v. Werme,* 939 F.2d 108, 114 (3rd Cir. 1991) ("Because evidence of a co-conspirator's guilty plea is extremely prejudicial to the defendant on trial…compliance with the mandatory duty imposed by Rule 105 is particularly important.").

III.

Appellant's third contention is that the trial court erred in permitting Corporal Zinn, a firearms examiner, "to testify as a lay witness regarding the handgun allegedly possessed by Appellant." Appellant maintains that Corporal Zinn, who was not qualified as an expert, provided testimony that "indisputably relied on technical and specialized knowledge."

Relying on the Court of Appeals decision in *Ragland v. State*, 385 Md. 706 (2005), he maintains that such "lay opinion" testimony should have been excluded.

Under Maryland Rule 5-701, testimony by a lay witness "in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." *Id.* Expert testimony, on the other hand, is "based on specialized knowledge, skill, experience, training, or education…[and] need not be confined to matters actually perceived by the witness." *Ragland v. State*, 385 Md. 706, 717 (2005). But, before a witness may give expert testimony, the trial court must determine: "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." Md. Rule 5-702.

The Court of Appeals discussed this issue at length in *Ragland, supra.* In that case, members of the Montgomery County Police Special Assignment Team ("SAT") observed an individual, Paul Herring, make several telephone calls, get in a van, and drive to a particular location, "where a hand-to-hand transaction took place between Herring and the passenger of a yellow Cadillac[.]" *Id.* at 709. Both Herring and the driver of the Cadillac left the area, at which time the officers stopped Herring's van, forced him to the ground, and recovered "a small object which they suspected to be crack cocaine." *Id.* at 710. Other officers stopped the yellow Cadillac and arrested its three occupants, including Jeffrey Ragland, who was sitting in the Cadillac's front passenger seat. *Id.*

Ragland was charged with distribution of a controlled dangerous substance. *Id.* At trial, two members of the SAT team, Officer Michael Bledsoe and Detective Kenneth Halter, testified regarding the events leading up to Ragland's arrest. *Id.* at 711, 713. Neither was called as an expert by the State nor qualified as an expert by the court under Maryland Rule 5-702. *Id.* Nevertheless, both officers testified that, based on their training and experience in the investigation of drug crimes, what they observed was a "drug transaction." *Id.* at 712-14. Ragland was ultimately convicted of distribution of a controlled dangerous substance. *Id.* at 715.

Before the Court of Appeals, Ragland argued that the officers' conclusions constituted expert testimony and should have been excluded by the trial court. *Id.* at 716. The Court agreed, holding that "Md. Rules 5-701 and 5-702 prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." *Id.* at 725. In so holding, the Court noted that both officers "devoted considerable time to the study of the drug trade [and] offered their opinions that, among the numerous possible explanations for the [observed events], the correct one was that a drug transaction had taken place." *Id.* at 726. The Court further observed that "[t]he connection between the officers' training and experience on the one hand, and their opinions on the other, was made explicit by the prosecutor's questioning." *Id.* The Court concluded that "[s]uch testimony should have been admitted only upon a finding that the requirements of Md. Rule 5-702 were satisfied." *Id.*

The Court of Appeals similarly held, in *State v. Blackwell,* 408 Md. 677 (2009), that testimony about the results of a horizontal gaze nystagmus ("HGN") test constituted expert

testimony "subject to the strictures of Md. Rule 5-702."[1] *Id.* at 691. In that case, the defendant, Paul Blackwell, was convicted of driving under the influence after a police officer testified that Blackwell failed an HGN test. *Id.* at 684-85. On appeal, Blackwell contended that the trial court erred in admitting the officer's testimony because the officer had not been offered or qualified as an expert witness. *Id.* at 685-86.

Applying its holding in *Ragland, supra,* the Court of Appeals agreed with Blackwell, holding that the officer's testimony "about Blackwell's performance on the HGN test was clearly expert testimony within Md. Rule 5-702." The Court noted that the officer "reported, among other things, that Blackwell had 'lack of smooth pursuit' and 'distinct nystagmus at maximum deviation' in each eye." *Id.* at 691. The Court found this significant because "the HGN test is a scientific test, and a layperson would not necessarily know that 'distinct nystagmus at maximum deviation' is an indicator of drunkenness; nor could a layperson take that measurement with any accuracy or reliability." *Id.*

The Court also drew a distinction between the HGN test, which requires expert testimony, and other field sobriety tests, which may not:

> [T]he HGN test does differ fundamentally from other field sobriety tests because the witness must necessarily explain the underlying scientific basis of the test in order for the testimony to be meaningful to a jury. Other tests, in marked contrast, carry no such requirement. For example, if a police officer testifies that the defendant was unable to walk a straight line or stand on one foot or count backwards, a jury needs no further explanation of why such testimony is relevant to or probative on the issue of the defendant's

[1] HGN is "a lateral or horizontal jerking when the eye gazes to the side." *Blackwell,* 408 Md. at 686 (internal citations and quotations omitted). "Although HGN is a natural phenomenon, alcohol magnifies its effects." *Id.* As a result, "law enforcement officials have looked to HGN as an indicator of alcohol consumption for several decades." *Id.* at 687.

> condition. A juror can rely upon his or her personal experience or otherwise obtained knowledge of the effects of alcohol upon one's motor and mental skills to evaluate and weigh the officer's testimony. However, if a police officer testifies that the defendant exhibited nystagmus, that testimony has no significance to the average juror without an additional explanation of the scientific correlation between alcohol consumption and nystagmus. In effect, the juror must rely upon the specialized knowledge of the testifying witness and likely has no independent knowledge with which to evaluate the witness's testimony.

Id. at 691-92 (*quoting State v. Murphy*, 953 S.W.2d 200, 202-03 (Tenn. 1997)).

Although the foregoing cases make clear that a witness's specialized training and experience is key in distinguishing expert from lay testimony, the language of *Blackwell* implies that such training and experience, by itself, is not necessarily dispositive of the issue. In other words, a lay opinion does not become an expert opinion merely because the witness had some prior training and experience, particularly when the fact-finder need not rely on said training and experience in assessing the validity of the witness's claim.

This Court expounded on this distinction in *In re Ondrel M.*, 173 Md. App. 223 (2007). In that case, the respondent, Ondrel M., was a passenger in a vehicle that had been stopped by the police. *Id.* at 227-28. Upon approaching the vehicle, Officer Brett Tawes "smelled an odor of marijuana emanating from inside." *Id.* at 228. A search of the vehicle revealed marijuana, and Ondrel M. was arrested. *Id.* At trial, Officer Tawes testified as a non-expert that "in his training at the police academy and in his work in the field as a police officer, he had been exposed previously to the smell of burning marijuana and therefore could recognize its smell." *Id.* Ondrel M. was subsequently found guilty. *Id.* at 229.

Relying on *Ragland*, Ondrel M. argued, on appeal, that the trial court erred in admitting the officer's lay opinion because it was based on the officer's training and

experience as a police officer. *Id.* at 238. This Court disagreed and held that Officer Tawes' testimony was properly admitted as lay opinion and did not require prior qualification. *Id.* Relying on the Court of Appeals reasoning in *Blackwell, supra,* this Court reiterated that certain testimony, even if given by a police officer, is not expert testimony if it was rationally based on the witness's perceptions:

> No specialized knowledge or experience is required in order to be familiar with the smell of marijuana. A witness need only have encountered the smoking of marijuana in daily life to be able to recognize the odor. The testimony of such witness thus would be "rationally based on the perception of the witness." *Ragland,* 385 Md. at 717.

In re Ondrel M., 173 Md. App. at 243.

This Court further pointed out that, "[i]n determining whether an opinion offered by a witness is lay opinion or expert testimony, it is not the status of the witness that is determinative. Rather, it is the nature of the testimony." *Id.* at 244. Specifically, "[t]here are certain fields where a witness may qualify as an expert based upon experience and training, however, use of the terms 'training' and 'experience' do not automatically make someone an expert." *Id.* (internal citations omitted). Accordingly, "the fact that Officer Tawes based his opinion regarding the odor of marijuana on his prior training and experience as a police officer does not render the opinion, *ipso facto*, an expert opinion." *Id.* at 245.

Applying the above principles to the facts of the instant case, we hold that the trial court did not abuse its discretion in allowing Corporal Zinn to testify that the firearm recovered from the motel was operable. *See Warren v. State,* 164 Md. App. 153, 166 (2005) ("The decision to admit lay opinion testimony is vested within the sound discretion

of the trial judge."). Unlike the officers in *Ragland* and *Blackwell*, Corporal Zinn did not rely on any scientific or technical analysis requiring specialized explanation or measurement, nor did he cite to any specific training in the operation of firearms when proffering his testimony. Instead, Corporal Zinn merely explained the steps he took to determine that the handgun was operable. *See In re Ondrel M.*, 173 Md. App. at 244 (explaining that the officer's testimony regarding previous exposure to marijuana served as "sufficient foundation for [him] to testify regarding the odor of marijuana[.]"); *See also Paige v. State*, 226 Md. App. 93, 125 (2015) (to testify on a matter, a witness must have personal knowledge, which requires that the witness have "the experience necessary to comprehend his perceptions.") (internal citations and quotations omitted).

Moreover, Corporal Zinn's ultimate opinion that the handgun was operable did not require any "specialized" experience or training. As in *In re Ondrel, supra,* where the officer concluded that an unknown substance was marijuana based on its smell, Corporal Zinn's conclusion was within the realm of that which a layperson would know as a matter of course. In other words, after firing the handgun, a reasonable person would likely come to the conclusion that the handgun was operable. *See Warren*, 164 Md. App. at 167 (testimony by police officer that defendant was "drunk" was not expert opinion because "[p]erceiving whether someone is intoxicated does not require specialized knowledge[.]

Because Corporal Zinn did not offer expert testimony, his opinion that the handgun was operable was permissible as "lay opinion" under Maryland Rule 5-701, as it was rationally based on events he witnessed first-hand. *See Bruce v. State*, 328 Md. 594, 630 (1992) ("[L]ay opinions which are derived from first-hand knowledge, are rationally based,

and are helpful to the trier of fact are admissible."). Thus, the trial court did not abuse its discretion in admitting Corporal Zinn's testimony.

IV.

Appellant's final contention is that the trial court imposed an illegal sentence. Appellant avers that only one of the statutes under which he was charged, namely Md. Code, Public Safety § 5-133(c), authorized the court to sentence him to the term imposed. He further maintains that this statute, which proscribes the possession of a firearm by a disqualified person, requires a showing that the defendant had been previously convicted of a crime of violence or other specific crime enumerated in the statute. However, in his case, he argues that the State only established that he had previously been convicted of a "disqualifying crime," which was insufficient to establish a violation of Section 5-133(c). As such, the trial court's imposition of a sentence under Section 5-133(c) was illegal, as he was not properly convicted of this charge.

Appellant is mistaken. The trial court had a lengthy discussion with the parties regarding this issue, and both the State and defense counsel agreed that appellant's "disqualifying crime" had been a crime of violence. Although the record does not disclose precisely why defense counsel agreed to this stipulation, it does show that both the State and the court made sure that the nature of the disqualifying offense would not be disclosed to the jury. Thus, we presume that defense counsel requested the stipulation to prevent the jury from learning about appellant's prior conviction of a crime of violence, which may have unduly prejudiced appellant. *See Carter v. State*, 374 Md. 693, 722 (2003). Because the only distinction between the two counts was the nature of the crime, the parties agreed

that the jury would be instructed on only one count. In doing so, the State recognized that Count 2, possession after a disqualifying crime, would simply merge into Count 1, possession after a crime of violence, if both charges were submitted to the jury. The State even offered to dismiss the second count if this were an issue, but both the court and defense counsel indicated that it would not be a problem. Thus, the record makes plain that Appellant's conviction was on Count 1 and thus his sentence legal.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.